THE BANK OF NEW YORK
NEW YORK'S FIRST BANK - FOUNDED 1784 BY ALEXANDER HAMILTON

ONE WALL STREET, NEW YORK, N.Y. 10286

BRUCE W. VAN SAUN
SENIOR EXECUTIVE VICE PRESIDENT
CHIEF FINANCIAL OFFICER

July 6,2004

Board of Governors of the Federal Reserve System
20'" Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Attention: Jennifer J. Johnson, Secretary

Re: Notice of Proposed Rulemaking Concerning Trust Preferred Securities and Related Matters – Docket No. R-1193

Ladies and Gentlemen:

The Bank of New York Company, Inc. ("BNY"), appreciates the opportunity to comment on the notice of proposed rulemaking ("NPR") of the Board of Governors of the Federal Reserve System (the "Board") regarding the tier 1 capital treatment of trust preferred securities and related matters.

We have set forth below our comments on the NPR.

I. Deduction of Goodwill

The NPR proposes that goodwill must now be *subtracted* from the base of core capital elements against which the percentage limit on restricted core capital element is applied. We disagree with this proposed treatment for the following reasons:

(i) The release by the FASB of Statements No. 141, *Business Combinations,* and No. 142, *Goodwill and Other Intangible Assets,* has resulted in higher levels of goodwill. Goodwill is expected to continue to rise since the U.S. banking market is entering what is generally expected to be a new period of rapid consolidation. Thus, the requirement to deduct goodwill will be a very meaningful change for U.S. bank holding companies including BNY. Furthermore, the required deduction of goodwill will have a much greater impact on U.S. bank holding companies than European banking organizations since European banking organizations have been permitted to reduce their capital level to a greater extent in cash transactions than U.S. banks.

(ii) The requirement that goodwill be deducted from core capital elements presumably implies that goodwill is substantially lacking in value. We believe that implication is incorrect. The periodic impairment testing requirement under FASB Statement No. 142 ensures that the amount of goodwill recorded on the balance sheet maintains value.

(iii) The NPR explains that the goodwill deduction "will help insure that a BHC is not unduly leveraging its tangible equity to issue restricted core capital elements." We are not aware of any large U.S. bank holding company that has issued excessive amounts of restricted core capital elements and we believe that market discipline and the Federal Reserve's regulatory oversight have prevented such an occurrence.

(iv) The risk-based capital guidelines already protect against over-reliance on goodwill through the requirement that goodwill be deducted from the sum of core capital components to determine tier 1 capital.

(v) If the Board nevertheless requires that goodwill be subtracted from the base of core capital elements against which the percentage limit on restricted core capital elements is applied, we believe the subtraction should be on a "net of tax" basis. This would recognize the absolute minimum economic value of goodwill and would be consistent with regulatory precedent for similar situations.

II. <u>15% Versus 25%</u>

The NPR proposes that "internationally active banking organizations" should limit restricted core capital elements included in tier 1 to 15% of core capital elements, net of goodwill. The NPR describes this as a formalization of the Board's commitment to the G-10 banking supervisors to use "best efforts to limit the issuance by internationally active banking organizations of innovative instruments" to 15% of core capital elements, net of goodwill.

This proposal in conjunction with the NPR's proposal related to the deduction of goodwill will severely limit U.S. banks' capacity to issue trust preferred securities and other restricted core capital elements. The NPR states that the purpose of the proposal is "to help insure comparability in capital structures among internationally active banking organizations." We do not believe comparability in this area is needed. Disclosure required under Federal securities laws and market discipline from that disclosure provides investors with sufficient information in analyzing U.S. bank's strength of capital. Also, we expect the Federal Reserve to continue to exercise its discretion on a case-by-case basis in evaluating the adequacy of capital. Furthennore, restricting only "internationally active banking organizations" to the 15% limit while imposing a 25% limit on domestic U.S. banks puts "internationally active" U.S. banks at a competitive disadvantage compared to domestic U.S. banks.

III. <u>Phase-In Period</u>

The NPR proposes a three year transition period. We believe that this time period is insufficient given the fact that a significant volume of trust preferred securities are outstanding which are not callable within the next three years or only callable at a premium. Should the Board proceed with the proposed new quantitative limits, we urge the Board to adopt a five-year instead of a three-year transition period to give affected bank holding companies more flexibility to manage their compliance with the new standards through internal capital growth and the redemption of callable trust preferred securities.

IV. Trust Preferred Securities "Without the Trust"

Regardless of the quantitative rules adopted, we urge the Board to consider permitting tier 1 capital treatment for direct issuances of junior subordinated deferrable 30-year debt of the type owned by the issuing trusts in trust preferred securities transactions (the "junior sub debt"), without requiring that the junior sub debt be issued through a trust. The additional expense and complexity of requiring the issuance of the junior sub debt through a trust does not seem justified since economically and substantively, the issuing bank holding company and investors would be in identical positions if the trust were eliminated.

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We commend the Board for its balanced analysis of trust preferred securities as a component of tier 1 capital and its decision to preserve trust preferred securities as tier 1 capital. However, we are very concerned with the limits that are proposed. The combination of the deduction of goodwill and the implied 15% limit would have a significant effect on U.S. banking institutions – particularly those participating in the on-going consolidation of the U.S. banking industry because of the goodwill arising under purchase accounting.

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Thank you for considering the views expressed in this letter. If you have any questions, please contact John Park, Senior Vice President of The Bank of New York, at (212) 635-7080.

Sincerely Yours,

Bruce W. Van Saun

Bruce W. Van Saun
Senior Executive Vice President
Chief Financial Officer